

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MINNESOTA

3 In Re: St. Jude Medical, Inc. 01-MD-1396 JRT/FLN
4 Silzone Heart Valves Products
5 Liability Litigation.

6 Minneapolis, Minnesota
7 April 2, 2003
8 1:00 p.m.

9 TRANSCRIPT OF PROCEEDINGS
10 (Status Conference)

11 BEFORE THE HONORABLE JOHN R. TUNHEIM,
12 UNITED STATES DISTRICT COURT JUDGE.

13 APPEARANCES:

14 On behalf of plaintiffs: James T. Capretz
15 Steven E. Angstreich
16 J. Gordon Rudd, Jr.
17 Charles S. Zimmerman
18 Joe D. Jacobson
19 Patrick J. Murphy

20 On behalf of defendant: Steven M. Kohn
21 David E. Stanley
22 Tracy J. Van Steenburgh
23 Liz Porter

24 Court Reporter: Karen J. Grufman
25 U.S. Courthouse, Suite 1005
Minneapolis, MN 55415
612-664-5105

1 THE COURT: Let's move to civil case number 01-1396,
2 In Re: St. Jude Medical, Incorporated Silzone Heart Valves
3 Products Liability litigation. We're here today for a status
4 conference. Counsel, let's note your appearances for the
5 record.

6 MR. CAPRETZ: James Capretz for the class.

7 MR. ANGSTREICH: Steven Angstreich for the class.

8 MR. JACOBSON: Joe Jacobson for Class II.

9 MR. RUDD: Gordon Rudd for the class.

10 MR. ZIMMERMAN: Charles Zimmerman, Your Honor, for
11 the class.

12 MR. MURPHY: Pat Murphy, plaintiff's liaison
13 counsel.

14 MR. KOHN: Steven Kohn for St. Jude Medical.

15 MR. STANLEY: David Stanley for St. Jude Medical.

16 MS. PORTER: Liz Porter, in-house at St. Jude
17 Medical.

18 MS. VAN STEENBURGH: Tracy Van Steenburgh, St. Jude
19 Medical.

20 THE COURT: Good afternoon to all of you.

21 Okay, Mr. Capretz, we'll hear from you first?

22 MR. CAPRETZ: Yes, Your Honor. Good afternoon once
23 again.

24 Your Honor, I believe the Court has the agenda that has
25 been tendered, and we also submitted a joint status report,

1 which was just completely signed moments ago. And I believe
2 there's a PTO.

3 Mr. Stanley, do you have that?

4 We'll submit it. We'll be submitting a PTO number 24,
5 which more specifically outlines the stay and what that means
6 to the dates for the Court's calendar.

7 Most of the matters other than item one, Your Honor,
8 concern motions, the inadvertently produced documents,
9 privilege log, Special Master, the James Ladner deposition,
10 and also the Sulzer Carbomedics document production which we
11 continue to have a problem with. Mr. Angstreich will address
12 that more specifically.

13 First, on the class certification order, as this Court
14 may be aware, and as is indicated in the joint status report,
15 defendants have indicated that they intend on filing an early
16 appeal request to the Eighth Circuit. We believe such appeal
17 is premature, particularly in light of the conditional
18 certification that the Court indicated in its order.

19 Notwithstanding that, we recognize that they do have the
20 right, I think they have to file that by the 8th of April, if
21 our calculations are right. And there are several things that
22 come to the Court's attention at this moment that must be
23 addressed as to how that might impact what we do and where we
24 go from here.

25 We're just prospectively very concerned because the

1 medical monitoring requirement and ongoing injuries that
2 matters continue to move as fast as they might, in addition to
3 the fact we have all these individual claimants depending on
4 us to work up their cases so they'll be trial ready at the
5 right time.

6 Probably the biggest two items that we would want to
7 address, and we'll hear from I suspect several people on this,
8 is the continued deposition of Mr. Ladner, that first day
9 deposition was taken.

10 And also the matter of the defendants requesting that the
11 Court take the preemption motion off the calendar. Plaintiffs
12 and the class object strenuously to them having this ability.
13 If St. Jude Medical wishes to take it off with prejudice, we
14 can understand.

15 But as this Court is probably aware, and I know the
16 defendants are aware, we were notified at the last moment, at
17 the time after the order was issued at the end of last week.
18 We have spent literally hundreds of thousands of dollars in
19 attorneys time and cost in preparing for this motion. The
20 defendants have always argued that this was -- they have
21 stated their case from the beginning this matter was ready to
22 be heard even without discovery. It's been the class position
23 that we needed discovery, and we undertook significant
24 discovery over months of time. And at a time when it's to be
25 heard and our papers are to be filed, the defendant says that

1 they don't want the motion on calendar, and just not setting
2 another date.

3 We believe if this Court -- as a result of that, Your
4 Honor, we did not file our response papers for obvious
5 reasons. And with the consent of St. Jude Medical, they were
6 due this past Monday. But we're prepared to submit them
7 momentarily and have this matter rescheduled in May, if
8 possible. And we really believe it's very important this
9 matter get on. It's a separate and distinct issue from the
10 appeals issue, which is a class certification.

11 They put it on the table. They should be held
12 accountable and be prepared to go forward with arguing this
13 motion. I've heard no cogent or compelling reason why this
14 matter should be off the calendar and heard at some later
15 date.

16 In the unlikely scenario it would be heard at a later
17 date, we would definitely ask this Court and urge this Court
18 to issue an order that it would not be any different than what
19 has already been proposed. Once again, we've been greatly
20 prejudiced with time and expense to get to the point where we
21 are.

22 So that is the principal issue that we have concerning
23 the preemption motion. And I suspect we should put that on
24 the floor for discussion at this point.

25 THE COURT: Very well.

1 Mr. Stanley?

2 MR. STANLEY: Regarding the preemption motion, Your
3 Honor, I think we have come to an agreement with the
4 plaintiffs' counsel about a stay for 60 days, so that we can
5 pursue our appellate remedy under 23(f) and figure out what
6 the posture of the case is going to be in 60 days. And at
7 that time, we would like to, at that point in time, in 60 days
8 come back and tell Your Honor whether we're going to move
9 forward with the preemption motion or put it back on calendar.

10 That's all we're asking for. We're not asking for an
11 indefinite stay. Let's focus the next 60 days on our 23(f)
12 petition. And at the end of that point in time, we'll come
13 back to the Court and advise the Court whether we intend to
14 put the preemption motion back on calendar.

15 I can represent that if we do, we're not going to make
16 any changes to it. It's just going to be the same motion.

17 THE COURT: So that your proposal would be around
18 June 1?

19 MR. STANLEY: June 1 or 2, yes.

20 MR. CAPRETZ: Your Honor, I know my colleague, Mr.
21 Angstreich, has a few choice words, since he spent a
22 considerable amount of time on this.

23 I want to say I still have not heard any reason why it
24 should be off the calendar. What I did hear Mr. Stanley say
25 is that he would postpone it for 60 days and then see what

1 happens. They may ask for another stay if the Court of
2 Appeals grants their request.

3 So I don't think I need to remind this Court that it's up
4 to the appeals court to decide whether or not they take the
5 early appeal. There's no reason why they need to focus -- I
6 don't know what that means to focus on an appeal. That's
7 maybe 150, 200 lawyer firm. We have far fewer lawyers on the
8 plaintiffs and class side.

9 We're prepared to proceed, and we think this Court should
10 set a date. The only thing that's going to happen is they're
11 going to come back on June 1st, if the Court of Appeals should
12 take an earlier appeal, a brief that can be briefed and
13 addressed and say they need more time. We're going to be
14 unduly prejudiced. Too much expense and time lost if we don't
15 hear this in a timely fashion.

16 And I might remind St. Jude Medical, notwithstanding the
17 capability of my esteemed colleague, that it's the Court's
18 discretion what to do with a motion. It's not St. Jude
19 Medical's prerogative to dictate the Court's calendar, to say
20 something is going to be off calendar and scheduled at their
21 convenience or when they would like it to be heard. It's the
22 Court's discretion, not St. Jude Medical's position to argue
23 when this should be rescheduled.

24 MR. ANGSTREICH: Your Honor, if I might on this.

25 THE COURT: Sure.

1 MR. ANGSTREICH: Because it comes as a surprise to
2 me that an agreement of a 60-day stay had anything to do with
3 the preemption motion. In fact, Mr. Stanley and I discussed a
4 stay of merits discovery pending the Court's ruling on the
5 preemption motion. That's how the entire stay issue began.

6 In fact, the first draft of the PTO 24, which will be
7 delivered to Your Honor, had written in it that 90 days after
8 the Court's ruling on the preemption motion, merits discovery
9 would be completed. And other dates would be triggered off a
10 ruling on preemption.

11 Never did we agree to the issue that's been put on the
12 table. In fact, we couldn't have, because the discussion
13 began before Your Honor's decision was received by us.

14 I am at a loss to understand why 60 days needs to be
15 taken. By April 8, they need to file whatever it is that has
16 to go to the Eighth Circuit. After that, they don't get
17 anymore filings. We have ten days to respond.

18 Then it's up to the Eighth Circuit to decide what it's
19 going to do. And I don't know how long that will take. But
20 certainly there is no reason for this Court to await a ruling
21 on a class certification, because preemption must be decided
22 regardless.

23 If in fact the Eighth Circuit takes the appeal
24 notwithstanding the fact that Your Honor's order is
25 conditional certification, and notwithstanding the fact that

1 we need to today set a briefing schedule on the aspect of Your
2 Honor's order relating to what state law should apply. But
3 assuming that they took it anyway, we're going to be back
4 before the Eighth Circuit, I assume, once Your Honor's
5 conditional order becomes a final class certification order,
6 which we believe it will be at some point, we're going to be
7 back before them anyway.

8 But notwithstanding whether this is a class action or not
9 a class action, we have been told that preemption is an
10 overarcng issue. It is such an overarcng issue, that alone
11 could have been the predicate for class certification.
12 Because certainly whether or not Mr. Smith in federal court in
13 New Jersey, or in California, or wherever he has his
14 individual case, or he's within Mr. Jacobson's Class II,
15 preemption would be applicable to him.

16 So it's got to be decided regardless, whether it's a
17 class or not.

18 And we're ready and we're geared up for that. And it
19 would be inappropriate. We are prepared -- and I think that
20 Mr. Rudd checked with the Court's schedule for some dates in
21 May, and I believe that the week of the 12th or the week of
22 the 19th were convenient for the Court.

23 Obviously, in light of what Mr. Stanley said, part of our
24 concern is really off the table now. It's not they're going
25 to refile something. That which they filed is what they will

1 have presented to the Court. So we don't have to redo all of
2 the discovery and have our experts go through all of the
3 materials --

4 THE COURT: The status right now, Mr. Angstreich, is
5 the defendants have filed the preemption motion and papers,
6 and we're waiting for your response at this point?

7 MR. ANGSTREICH: That's correct. Our response was
8 due Monday. On Friday, they said they were pulling it off
9 calendar and that our response was no longer due on Monday.

10 But even if that weren't the case, there was no way, if
11 they weren't prepared to argue it on the 15th of April, that
12 we were going to give them our papers and give them who knows
13 how many months to address it as opposed to the ten days that
14 they had.

15 So that what we would propose doing is we obviously can't
16 argue it on the 15th, because there's just not enough time
17 between now and then to get our papers in, give them the
18 opportunity for reply, and then give Your Honor a reasonable
19 period of time to review what is not an insignificant amount
20 of paper. Although I would say that based upon what I've seen
21 of ours, we have the weight of the evidence as compared to
22 their paper.

23 But so sometime in May would do it, and we could then
24 work backwards to it. But to wait 60 days and then schedule
25 this and then address this issue just makes no sense. We have

1 no problem with a 60-day stay of discovery. And we think that
2 makes sense. Because that gives us the time to get preemption
3 on the table, see where we're going on the class issues. And
4 to be very honest about it, Your Honor, the plaintiffs
5 committee and all of the attorneys have spent an inordinate
6 amount of time putting this package together, and they really
7 would like some time before they begin the rest of the
8 discovery. So that's why we have no problem with 60 days on
9 that.

10 But that's where we are. So we need to schedule
11 preemption.

12 But more importantly, Your Honor, we really need Your
13 Honor to give us a briefing schedule. Because Your Honor has
14 indicated in the order that we need to come back to you with a
15 little more information and case citation on whether Minnesota
16 is the appropriate law to be applied based on a governmental
17 interest analysis.

18 And that leads me to one issue which is not on the agenda
19 but is critical for it.

20 We don't know where the 10,500 valves were sold. Now, we
21 know that the defendant knows that. And it's conceivable that
22 all 10,500 valves were not uniformly spread out throughout the
23 50 states.

24 We also need to know, it's not just where they were sold,
25 but we need to know potentially where the plaintiffs reside.

1 For example, Mr. Grovatt is a New Jersey citizen, but his
2 valve was implanted in Texas. There's an argument one might
3 make in that regard that not only is Minnesota law at issue,
4 but maybe Texas as well as New Jersey.

5 So that's part of the information. It makes no sense
6 really to give you a 50-state analysis of the issues. As
7 we've begun it, we have a book on medical monitoring in a
8 50-state analysis. But to argue governmental interest for a
9 state that has neither a plaintiff nor a valve that was ever
10 implanted really would be a waste of the plaintiffs' time, the
11 defense time, and Court's time in analyzing that. So we need
12 that information from the defendants so that we can truly give
13 Your Honor that kind of analysis.

14 Those are the points that I think we need to deal with.

15 THE COURT: Mr. Stanley.

16 MR. STANLEY: Again, Your Honor, we're only asking
17 for a very brief amount of time to sort of reassess the
18 posture of the case.

19 The preemption hearing, from what I understand from Ms.
20 Gleason, wasn't going to happen on the 15th. There was
21 confusion. We granted a one-week extension for them to file
22 their response. We were supposed to get a one-week reply,
23 extension on our reply. And somehow that got translated into
24 a four-day extension, and that was going to get the Court
25 enough time. So the 15th was in peril in the first place.

1 We still have the issue of once we get their opposition,
2 which I understand is going to be fairly lengthy and fact
3 oriented and having to do our reply. And although we may have
4 many laurels in our law firm, Your Honor, we have a finite
5 number working on this litigation, and the same people working
6 on this 23(f) petition.

7 THE COURT: When was that due?

8 MR. STANLEY: I believe it's April 8 -- or April 10.

9 THE COURT: If we put off the hearing until, for a
10 month, essentially, through I think the third week in May,
11 would that pose any particular difficulty for you?

12 MR. STANLEY: We have to check the person, Mr.
13 Martin, who is handling this, we would have to check his
14 calendar. Plus Mr. Kohn advised me we have a mediation in
15 Canada in this litigation around that time. Maybe if we could
16 get back to the Court.

17 THE COURT: Why don't you do that. I would like to
18 proceed with a hearing, the preemption motion, if it's going
19 to go forward. Obviously, it's a major, major issue in the
20 case. The Court would like to get on to it as quickly as
21 possible.

22 I mean I would propose, you know, sometime during the
23 week of May 12th, which is a good week for me. If that week
24 is problematic given what's going on in Canada, we can go the
25 following week. We can find a time in there. The month of

1 May generally is pretty good for me. So I would like to
2 proceed in May if we can. And you can advise me if you will
3 concerning a possible conflict with the Canadian case and Mr.
4 Martin's schedule.

5 MR. STANLEY: We will do that, Your Honor.

6 MR. ANGSTREICH: Your Honor, if possible, I have a
7 class action trial that's supposed to begin May 6. It
8 probably will go into the week of the 12th. I know that I
9 will be arguing a portion of the preemption motion. If the
10 20th is convenient for the Court, or the 19th or the 20th,
11 that would be fine with our schedule. We've tried to block
12 that out. Would that be okay?

13 MR. STANLEY: Steve tells me that's the week of the
14 Canadian mediation.

15 MR. ANGSTREICH: Let's try to set it the week of the
16 12th. Because if we go beyond that, we go with Memorial
17 Day --

18 MR. STANLEY: Your Honor, we'll be back to the Court
19 shortly.

20 MR. ANGSTREICH: I'll do what I have to do so I'm
21 available. If we could put it towards the end of the week of
22 the 12th?

23 THE COURT: Wednesday the 14th, Thursday the 15th,
24 most of the day Friday the 16th at this point would be okay.
25 So the end of the week would be fine. Maybe we should shoot

1 for the 15th and see how that works.

2 MR. ANGSTREICH: We could do that the morning, the
3 way we were going to do this one, at 9:30 in the morning?

4 THE COURT: I believe so. Let me just check. Yes,
5 we can do that the morning of the 15th.

6 MR. STANLEY: And whatever date we pick --

7 MR. ANGSTREICH: If it's 5/15, you would want the
8 final package to you by the 10th? Five days before the
9 hearing?

10 THE COURT: If I could have it a week before, that
11 would be helpful.

12 MR. ANGSTREICH: That's five days is not a week,
13 it's seven days.

14 THE COURT: That would be the 8th.

15 MR. ANGSTREICH: All right. And that means that I
16 have to get ours to you by April 28; right, 4/28 ours is due.

17 Your Honor, with respect to the other briefing
18 schedule --

19 THE COURT: Just one moment. We'll make this
20 tentative, because I do want to hear back relative to Mr.
21 Martin's schedule and any potential conflict with the Canadian
22 mediation. Let's make this tentative with the dates. Okay?

23 MR. ANGSTREICH: Very good, Your Honor.

24 MR. CAPRETZ: Could we have, Your Honor, with all
25 due deference and respect, could we then have a date we're

1 going to know for certain, Your Honor? There's so many things
2 contingent on our planning and activities.

3 THE COURT: I think we will proceed as if it's going
4 to be on that date, unless the defendants provide a reasonable
5 conflict for that date, then we would move it off probably a
6 week or two or three after that.

7 MR. CAPRETZ: Could we probably resolve that this
8 week? There's so many things that come into play here.

9 MR. STANLEY: Yes.

10 THE COURT: Okay. Very well.

11 MR. CAPRETZ: The next issue would be the briefing
12 schedule. We think it's appropriate, as was mentioned by
13 myself and co-counsel, we both believe the appeal is premature
14 at this point. We would like to see a scheduling order set.
15 We can proceed with the research and get this matter on the
16 way rather than any more delays. We're concerned about the
17 overall pattern of delay. And anything we can do to keep
18 things on track would be very appreciated.

19 THE COURT: I think that's true from a general
20 standpoint. And I would like to keep things moving as quickly
21 as possible as well.

22 I should hear from Mr. Kohn or Mr. Stanley on this point,
23 about the timing of what essentially is briefing on the
24 Court's suggestion of subclasses.

25 MR. KOHN: Your Honor, we haven't analyzed what a

1 reasonable schedule would be. I think the first thing is for
2 plaintiffs to tell us when they would be filing their opening
3 brief. We would just like time to respond.

4 They indicated a minute ago they might need some
5 discovery on the physical locations of the plaintiffs. I'm
6 not sure that we have the information as to where all the
7 plaintiffs are at this time. They may know where they were
8 when the valve was implanted. If they need time to take
9 discovery on that issue before they do the briefing, then they
10 need to tell us when they think they can get their briefs
11 done, and we would like a suitable amount of time to file our
12 responses.

13 THE COURT: Mr. Angstreich.

14 MR. ANGSTREICH: It isn't incumbent on us to get the
15 first brief in. We should have some time after the 28th of
16 April.

17 But the only discovery that we need is where the 10,500
18 valves implanted in the United States were implanted. And
19 then the residency, I guess they won't know whether they're
20 citizens of a particular state. They'll only know where they
21 resided at the time of the implantation.

22 Those are the only pieces of information that we need. I
23 don't think I need to take any formal discovery or send an
24 interrogatory or request for documents for 30 days. They know
25 exactly what they need.

1 If we could get that by the 28th of April, then by the
2 end of May we would have our brief in. I think that would be
3 a sufficient amount of time.

4 Because we really can't undertake the full analysis until
5 we know where the potential subclasses might be, or whether or
6 not there's even a need for subclasses depending upon where
7 all of these people are. The law of every state may be the
8 same based upon where the implantations occurred.

9 THE COURT: That's clearly possible. We just don't
10 know I guess at this point, because the Court did make it
11 clear that the individual state laws will be applied. It may
12 be the case that most of the laws are very similar. I just
13 don't know the answer to that question.

14 MR. ANGSTREICH: I think if we had the information
15 by the 28th of April, or even the 30th of April, that gives
16 them the entire month to go find that information.

17 THE COURT: What do you think, Mr. Stanley, would
18 that work?

19 MR. STANLEY: Yes, Your Honor, we can get them the
20 information by that time.

21 MR. ANGSTREICH: Then our brief would be in within
22 30 days?

23 THE COURT: That sounds fine.

24 MR. ANGSTREICH: So we'll be -- 5/30, is that a
25 weekday, the 23rd --

1 THE COURT: May 30 is a Friday.

2 MR. ANGSTREICH: Okay. Then like Monday?

3 MR. KOHN: I think 30 days would be appropriate.

4 THE COURT: I think that's fine.

5 MR. ANGSTREICH: June 30 for the reply.

6 MR. CAPRETZ: Steve, I think Joe would like to --

7 MR. ANGSTREICH: You have something?

8 THE COURT: Mr. Jacobson?

9 MR. ANGSTREICH: Thank you, Your Honor.

10 MR. JACOBSON: Judge, Joe Jacobson.

11 There's just one jurisdictional issue as far as the issue
12 of the class certification. I believe it would be premature
13 for them to get a 32(f) motion. If the Court of Appeals
14 grants it, I believe this trial court may lose jurisdiction
15 over the class certification order in the pendency of the
16 appeal. Maybe we'll brief it, but it will be sort of sitting
17 there as a nullity while the Court of Appeals has
18 jurisdiction. I just wanted to raise that as an issue to
19 think about.

20 THE COURT: Let's proceed ahead for now, and I guess
21 that's a bridge we'll probably have to cross at some point in
22 time if we come to it.

23 MR. CAPRETZ: Your Honor, at this point, we will
24 address the three issues -- well, there are four, actually.
25 Maybe we should take, if counsel doesn't mind, address the

1 inadvertently produced logs, the privilege log and the Sulzer
2 Carbomedics, and we'll go to Ladner.

3 THE COURT: Sounds good.

4 MR. ANGSTREICH: Your Honor, we can do the Sulzer
5 Carbomedics one. I'll let my opponent from Sulzer Carbomedics
6 explain to the Court why we haven't gotten the documents.

7 Not a very cogent argument, I would say.

8 We've submitted an order, and we would ask that the Court
9 enter the order and we'll send it off to Mr. Lewis, and
10 hopefully that order will spur the documents being produced.

11 THE COURT: The transcript should reflect the fact
12 that there is nothing that's been deleted from the transcript
13 based on Mr. Angstreich's comments.

14 Anything from Mr. Stanley or Mr. Kohn on this point?

15 I think it's appropriate for the Court to sign the order
16 and issue the order to show cause. The order that was
17 provided I think --

18 (Off the record.)

19 We're proposing the date of April 15 at 9:30. We could
20 try to make it coincide with the next status conference so
21 everyone would be here.

22 MR. CAPRETZ: That would make sense, Your Honor.

23 THE COURT: Just to save on some time. So the Court
24 will sign the order requiring Sulzer Carbomedics to show
25 cause, and we'll set it for the date of the next status

1 conference.

2 MR. ANGSTREICH: Very good.

3 Your Honor, the other, the two motions dealing with
4 inadvertently produced documents and the privilege log, the
5 burden really is on the defendants to come forward.

6 Your Honor is going to be handed today or tomorrow an
7 agreed upon Pretrial Order number 24, which is resetting
8 dates.

9 One of the things that has been provided for in there is
10 this 60-day stay of discovery. And there is a disagreement
11 that presently exists between the parties with respect to
12 whether that stay impacts upon Mr. Ladner's completion.

13 There was an order that was entered. And in fact, one of
14 the issues on today's agenda was Mr. Ladner, his deposition.
15 We resolved the question of who the master would be. But the
16 question of whether or not we had a burden to come forward
17 with a list or not come forward with a list was to be argued
18 this morning, or this afternoon, it really wouldn't have made
19 much sense to keep that on the agenda if there was an
20 agreement that we were going to put Mr. Ladner's deposition
21 off. It's only three hours. It makes little sense to put it
22 off, the deposition, if we took it, we would be proposing to
23 take it on April 15, since we blocked that day out here anyway
24 to be here.

25 And certainly that would be a week after St. Jude's brief

1 was due to the Eighth Circuit. And certainly they wouldn't
2 need to be focusing on anything, because they wouldn't be
3 responding to our preemption papers yet. They won't be
4 focusing on the Eighth Circuit argument. And I'm certain that
5 we could find three hours to complete it.

6 I know that there's, that it was a cross notice
7 deposition, and that the Ramsey County counsel may want to
8 participate, and that might affect how long the deposition
9 goes on that day. But certainly I think that one should be
10 completed. And that's really our position.

11 And then maybe Mr. Stanley or Mr. Kohn will address the
12 other two issues.

13 MR. CAPRETZ: If I may, to enlighten the Court on
14 the Ramsey County deposition. I know there are several hours
15 planned. That's going to go forward. It's going to be
16 noticed whether or not this Court would postpone Mr. Ladner.
17 So it's academic, and I don't see any benefit be gained by St.
18 Jude Medical arguing to postpone the completion of the MDL
19 deposition.

20 So we would appreciate the Court considering that fact,
21 that it's going to be scheduled anyway during this period. So
22 I'm not sure what that would gain.

23 THE COURT: Thank you.

24 Mr. Stanley.

25 MR. STANLEY: Your Honor, a couple things.

1 First of all, Mr. Ladner is not available on the 15th.

2 So trying to schedule him on the 15th is not going to work.

3 That aside, you know, I guess, you know, it all depends
4 how you look at things what the perspective is. We sort of
5 have an agreement we should have a 60-day stay of merits
6 discovery.

7 What's the compelling reason to have Mr. Ladner's
8 deposition go forward during the 60-day time period? To quote
9 Mr. Capretz, I haven't heard one cogent reason why his
10 deposition has to go forward the next 60 days. At the end of
11 the 60 days the stay is up, and merits discovery will proceed
12 along the schedule that we've agreed to in Pretrial Order 24,
13 and they can take Mr. Ladner's deposition at that time.

14 And as far as Ramsey County goes, we may want to explore
15 having this, you know, getting a stipulation that we'll have a
16 Special Master there. There are issues still to be resolved
17 on Mr. Ladner's deposition.

18 We still strongly believe that plaintiffs' counsel should
19 submit a list of the areas of inquiry, so that the Court can
20 give at least some guidance not only for the parties but for
21 the Special Master. So we don't have the same problems we had
22 at the last deposition. That issue needs to get resolved.

23 I think that, you know, again, there isn't any compelling
24 reason, there's not a motion or a compelling reason to have
25 his deposition go forward the next 60 days, and there's no

1 reason we cannot wait until June.

2 MR. ANGSTREICH: Your Honor, if I might. We filed a
3 motion to compel the deposition of Mr. Ladner. We argued it,
4 and Your Honor entered an order and said we could take three
5 hours of his deposition.

6 We have a disagreement over whether a list would be
7 beneficial. I think that it probably would be beneficial. I
8 can't assure myself that the defendants would even look at it,
9 because when they wanted documents to be given to them in
10 advance of a deposition to assist them, and we did that, as
11 Your Honor will hear, on the inadvertently produced documents,
12 they didn't bother to look at the documents we gave them. So
13 I don't know that it really makes that much of a difference
14 other than to school Mr. Ladner on how he should prepare
15 himself for it.

16 With that said, I agree with Mr. Stanley that the world
17 will not end if I don't take Mr. Ladner in the next 60 days.

18 However, that's 60 more days since the last deposition
19 since we were focused, since everybody was geared up for it.
20 I appreciate the fact he's not available on April 15. But I
21 would like to take his deposition the next available date when
22 we can schedule it, just so I can get it out of the way, and
23 then I know exactly what additional merits discovery we're
24 going to be undertaking in those 60 days.

25 It's only three hours. I can't give you a compelling

1 reason, Your Honor. The world will not end. Our briefs are
2 not a function of Mr. Ladner's deposition. We did start it.
3 We would like to complete it. We would like to complete it in
4 a timely fashion.

5 THE COURT: Mr. Stanley.

6 MR. STANLEY: I trust that if the Court asked Mr.
7 Angstreich to submit a list, that he wouldn't submit to you
8 2,000 matters, subject matters, and 13,000 pages of documents
9 he might question him about. I assume what we would get is a
10 very focused list of the areas he's going to question, and
11 Your Honor could make a decision what is and is not
12 appropriate.

13 MR. ANGSTREICH: Just so the record is clear, Your
14 Honor, I gave you the very same CD-ROM that I gave Mr.
15 Stanley. There are 13,000 documents on that. And we made a
16 good faith effort to distill from 102 CD's to one CD with what
17 may have been 150 to 300 documents on it. It was the universe
18 of documents that we might be questioning Doctor Flory about,
19 so that there could never be a question that I didn't give
20 them something and changed my mind about it.

21 So the record should be clear that if Your Honor told us
22 to give them a list, we might give them a much broader list of
23 subject matters. We might not question him about all of those
24 subject matters, but we would make certain that we covered
25 every subject matter so we couldn't be accused of not putting

1 it before them.

2 THE COURT: Anything else, Mr. Stanley?

3 Well, I think it would be helpful to get this matter
4 resolved and out of the way. So I think the deposition, the
5 remaining part of the deposition should go forward. We do
6 have a Special Master who is ready to oversee the additional
7 three hours or whatever it is of the deposition.

8 I continue to think that a list would be helpful. But in
9 terms of the timing, can we schedule this and get this done by
10 May 15th? Would that work, do you think, given Mr. Ladner's
11 schedule?

12 MR. STANLEY: I'll check with Mr. Ladner's schedule.

13 THE COURT: I would like to get it out of the way.
14 It's been hanging here for awhile.

15 I'm not going to require a list. I do think a list would
16 be helpful for both sides. It would focus this and make sure
17 it gets done during the time scheduled. So I would like to
18 encourage it, but I'm not going to require it at this point in
19 time.

20 I also will issue an order appointing the Special Master.
21 Essentially, what I intend to say in that order is that the
22 Special Master will have the power to regulate the conduct of
23 the deposition and rule on all objections that may arise
24 during the deposition. And these rulings shall be final for
25 purposes of the deposition. And then I will also require him

1 to issue a report, and the parties can file objections to the
2 report if they believe that's necessary.

3 MR. ANGSTREICH: Thank you, Your Honor.

4 MR. CAPRETZ: Your Honor, the next thing is the
5 defendant's motion for the return of inadvertently produced
6 documents.

7 THE COURT: I did review the materials on that.

8 Is there anything else, Mr. Kohn?

9 MR. KOHN: Your Honor, I'm prepared to submit it on
10 the briefing. I think it was well briefed by both sides.
11 Unless the Court has a specific question that I could respond
12 to.

13 THE COURT: I don't have any specific question.
14 Mr. Angstreich?

15 MR. ANGSTREICH: Your Honor, the only thing that I
16 would like to point out to the Court, because I did not do
17 that in the submission. I had expected that people might have
18 looked at the list in our brief.

19 Document TIF number -- bear with me for one second -- TIF
20 number 0330071198 and 99, which if Your Honor would look in
21 the, on the CD, you would have to look at it as 0071198.
22 Because the TIF's don't match. Three places disappear when it
23 goes in. But those two, that two-page document, stamped
24 attorney/client work product privilege, are blank. There's
25 nothing on it.

1 Which is very significant, at least from our perspective.
2 Somebody went to the trouble to take two blank pieces of paper
3 and stamp them. Which goes to the question of just how
4 serious an effort was undertaken to discern what was and was
5 not confidential. It didn't say redacted. There was nothing
6 on either piece of paper.

7 The other point that we would like to make about this,
8 and the fact that 25 documents were not inadvertently raised
9 by Mr. Stanley in either of his letters, those are the ones
10 that were on the Flory CD, but a point that we really have not
11 emphasized is the whole purpose behind asking for
12 inadvertently produced documents, those documents that somehow
13 slipped through the cracks. Not that you've stamped
14 confidential attorney/client work product privilege, gone
15 through the trouble of ascertaining these are in fact
16 privilege documents, and notwithstanding the fact they're
17 privilege documents, that you scan them in, review the scan.
18 Because somebody must have looked at the CD where they were
19 scanned, and then say, my goodness, we've inadvertently
20 produced privileged documents. If there had been no footer on
21 some of these documents, one might have assumed therefore that
22 something fell through the cracks, somebody didn't see what
23 was happening.

24 But the reality here is that it's not just 46 documents.
25 At this moment, we know that there are 71 documents with a

1 footer that have been produced. To be very honest about it,
2 Your Honor, there are 102 CD-ROMS. I don't know for a fact
3 that's the universe of documents with these footers that
4 actually were produced.

5 I know that the reason that I found these additional 25
6 is because I went to the Flory CD, which is a culling from a
7 whole host of CD's, just to see what we produced to them in
8 advance. Because I didn't think it was possible it suddenly
9 dawned on them in June -- in January that it had to be before
10 then.

11 The points I want to make are somebody went to the
12 trouble to stamp two blank pieces of paper as attorney/client
13 work product privilege and put a TIF number on them. And
14 somebody has missed another 25 allegedly privilege documents.

15 And third, if they had done what they asked Your Honor to
16 do, which was to order us to produce documents in advance of
17 deposition, and actually looked at them, they would have known
18 in November.

19 Lastly, these document productions began in December.
20 Not in June. The CD's were produced in December. Documents
21 were produced in the state court cases even before December.
22 Documents that are privileged, that allegedly were
23 inadvertently produced, were inadvertently produced in the
24 state court proceedings before they were produced to us.

25 It's just one of those things. Sometimes it happens.

1 But this is not one of those times where you can go oops.

2 And by the way, if these 25 allegedly attorney/client
3 work product privilege documents that Mr. Stanley hasn't put
4 in his letter weren't inadvertently produced but were
5 "advertently" produced, if that is such a word, how do we know
6 which stamped document was inadvertently produced and which
7 stamped document wasn't? You just can't have it both ways.

8 Thank you.

9 MR. KOHN: As to the 25 documents that bear the
10 footer attorney/client privilege, that was made clear in our
11 reply that those documents were inadvertently marked privilege
12 but were never on the privilege log and were not part of the
13 46 we're asking for back. So it's not an issue before the
14 Court.

15 And although it's abundantly clear in my declaration and
16 I believe in our papers, the CD that was given to Mr. Stanley
17 two business days before the Flory deposition in November,
18 which contained some of these inadvertently produced
19 documents, there was no letter from counsel telling us that on
20 that CD there were documents that bore any kind of a privilege
21 designation, nor did counsel advise us at the deposition or at
22 any other time until we located those in January.

23 Thank you, Your Honor.

24 MR. ANGSTREICH: Your Honor, I don't want to belabor
25 the point. The CD was Federal Expressed to Mr. Stanley on

1 November 7. He received it November 8. Doctor Flory's
2 deposition began on the 13th, and continued on the 14th.

3 These were documents they produced to us. And what I'm
4 now even more troubled by is somebody went to the trouble of
5 stamping 25 documents attorney/client work product privileged,
6 but they weren't inadvertently produced they were
7 intentionally produced. And they want to still argue to you
8 that they inadvertently produced some other documents that
9 were stamped? I just don't understand how that even remotely
10 can be argued. You just can't have it that way.

11 And certainly, simply because we've pointed out the fact
12 that these were there, now we're told, oh, we didn't mean to
13 stamp them? There has never been a letter to us saying, by
14 the way, there are documents with footers that say
15 attorney/client or work product privilege, we really didn't
16 mean to stamp them.

17 So if they want to point to us that we didn't tell them
18 something, this is the first we've heard when we got the reply
19 to it. Thank you.

20 THE COURT: Anything else, Mr. Kohn?

21 MR. KOHN: No, Your Honor. Thank you.

22 THE COURT: The Court has reviewed this matter
23 carefully. I'm going to order the return of the 46 documents.
24 I find that the defendants have satisfied the Hydroflow test,
25 and in the Court's view, these were inadvertently produced

1 documents.

2 I have a proposed order somewhere in the papers here that

3 I saw. Any comment on the proposed order?

4 MR. ANGSTREICH: Just one second, Your Honor?

5 THE COURT: That's fine.

6 MR. ANGSTREICH: There's a problem with the order.

7 If I'm going to destroy the CD's on which these multi-page

8 TIFS appear, they'll have to supply me with a replacement.

9 The order doesn't compel them to do that.

10 MR. STANLEY: I want to read this, too. Let's work

11 on an order and we'll get something.

12 THE COURT: Okay, very well.

13 Okay, what's next?

14 MR. CAPRETZ: The only one in the substantive area

15 that I see now, I don't know somewhat entwined, is we

16 presented a challenge to defendant's privilege log. I would

17 make a prefatory comment, Your Honor, that I'm not sure St.

18 Jude Medical has ever committed to us that we have the

19 privilege log in total. There was some discussion of this at

20 some earlier hearing. And Mr. Kohn pointed out that since

21 there were further documents being produced, there may be an

22 opportunity or a necessity to bring forward more privilege log

23 annotations to our attention. But I don't think we've

24 received anything.

25 I would like to put something on the record as to have we

1 now received the entire privilege log being claimed by St.
2 Jude Medical?

3 MR. KOHN: Yes, Your Honor, there are no documents
4 that are presently in line to be reviewed for privilege.
5 There are some documents that we're reviewing in response to
6 some meet and confers that may or may not get produced if
7 they're responsive. And they'll be subject to a privilege
8 review.

9 So it's possible there could be, but it's very unlikely.
10 So I think I can say that it's final with those caveats.

11 THE COURT: Okay. Well, that's fine. The Court is
12 in the process of going through that, the privilege log issue.
13 I hope to finish that up shortly.

14 MR. ANGSTREICH: Your Honor, if I might.
15 Forty-three of the 46 documents on the inadvertently produced
16 we challenged. I believe it's 43. I think we agreed that
17 three fell within a true privilege. At least it was
18 identified on the privilege log as having been the providing
19 of advice or the requesting of advice.

20 But 43 we challenged, as well as my letter of February 5
21 indicates. And I did a whole chart on that.

22 I know Your Honor doesn't have those documents. We have
23 not produced them to you because we agreed we wouldn't look at
24 the documents again. And I know that the defendants have not
25 produced those to you.

1 Notwithstanding our requirement to return them, it still
2 is our position that those documents don't qualify for the
3 designation. While we can go through the process of waiting
4 for the new TIFS and signing the order, if Your Honor is of
5 the opinion that the designation, the log itself and those
6 documents that have been designated don't qualify for the
7 privileges for which they've been asserted, then that would
8 impact on the inadvertently produced documents that would
9 thereby not qualify as an attorney/client or work product
10 document.

11 So that would be a separate issue that I would like to
12 revisit when Your Honor is finished reviewing the documents.

13 THE COURT: Well, let's revisit that if we need to
14 at that point in time. The Court will review some more
15 documents.

16 MR. ANGSTREICH: Very good. Thank you, Your Honor.

17 THE COURT: Mr. Capretz.

18 MR. CAPRETZ: Yes, Your Honor. The next item is the
19 status of state court proceedings.

20 I can report to the Court that our state liaison counsel
21 has been on business with his wife, who is really on business
22 in Australia for a few weeks. So I think he fell out of the
23 loop in Ramsey County.

24 THE COURT: You didn't find any cases down there,
25 did you?

1 MR. MURPHY: No, after a thorough search. And as
2 long as Your Honor will testify in front of the IRS for me, I
3 would appreciate it.

4 THE COURT: Sounds good.

5 MR. CAPRETZ: In Ramsey County, Your Honor, the
6 argument on preemption was held I think a week ago. And
7 needless to say, and understandably so, we have not heard
8 anything further from Judge Gearin. We had cases scheduled to
9 start in June of this year, a block of four cases. And due to
10 several circumstances, that has all been changed.

11 And as of today, Mr. Kohn, the two that we had were moved
12 to September. And the two that a local attorney named Chuck
13 Johnson has been moved or will be moved pursuant to an
14 agreement with St. Jude Medical.

15 THE COURT: These four cases are where?

16 MR. CAPRETZ: Ramsey County. Part of the Ramsey
17 County proceedings.

18 So that's an update. And we're in the process of
19 negotiating a scheduling order, pretrial scheduling order in
20 light of the changed dates.

21 The Texas cases, which constitute the bulk of the state
22 court matters, are under appeal. If the Court remembers, the
23 Texas District Court allowed, or agreed with the preemption
24 notion on the Texas law. And they're all being appealed at
25 the current time.

1 I think that's it unless -- counsel?

2 MR. MURPHY: Just that we are pleased to get the
3 conditional order. And when it's final, then we have lots of
4 things to do from a state liaison coordination standpoint.
5 We've communicated to everyone the Court's conditional ruling.
6 So they're kind of waiting for that to get finalized.

7 THE COURT: Okay. Very well.

8 Okay, Mr. Zimmerman, do you have something?

9 MR. ZIMMERMAN: I do. I just wanted to address the
10 Court on a topic of enormous sensitivity to everyone, which is
11 the settlement problem, or issue, or process.

12 We've been in MDL proceedings about two years now. I
13 think in April the Court was given the privilege of having
14 this MDL by the panel.

15 In the experience, of my experience of MDL's, there's
16 never a right time and there's never a wrong time to start
17 circling around the question of settlement and getting the
18 people engaged.

19 I know we've got Rick Solum as a Special Master. Perhaps
20 a person like Brian Short, Professor Haydock, perhaps anyone
21 that the Court feels comfortable with should begin to at least
22 have some discussions about the parameters of what the
23 thinking of the parties is and start bringing the MDL to that
24 point.

25 If I may editorialize for a moment. I think the wrap on

1 MDL's has become that we don't get things done here, we just
2 do a lot of process. And I know that's not the agenda of the
3 parties and it's not the agenda of the Court.

4 But I think to start beginning that process now, and even
5 though maybe we're not completely ready, and there are appeal
6 issues here and unstated issues there, I think it would be a
7 good idea to begin asking the Court how the Court thinks it
8 should begin, and asking the parties to sit down and start
9 exploring those parameters.

10 It's with that I stand before the Court. With all due
11 respect, I have not been in these proceedings each time, and I
12 apologize for that. I have had to go other places. But I do
13 think it is appropriate time to raise the topic.

14 Thank you.

15 THE COURT: Thank you, Mr. Zimmerman.

16 I think that point at some point here is approaching.
17 I'm not sure we're there right now. But I will give your
18 comments some thought, and perhaps this is a subject we can
19 return to in one of the upcoming status conferences.

20 And defendants, if there's any thought that you have,
21 perhaps at the next settlement conference -- the next status
22 conference, I should say, on this point, you can raise it
23 then.

24 MR. CAPRETZ: That was unscripted, but appropriate.
25 And I appreciate Mr. Zimmerman's thoughts.

1 What the courts have done, as this Court is certainly
2 well aware, like Judge Davis in Baycol, and Judge Ackerman in
3 the Pennsylvania State Baycol ordered mediation sessions. And
4 that's proven to be successful in those proceedings.

5 But we do appreciate Mr. Zimmerman's thoughts, and we are
6 certainly open to discussing it. And we're not going to take
7 the posture one famous lawyer in Texas took: If we don't
8 settle everything we're not settled in settling anything.

9 We'll hear the Court's thoughts, look forward to
10 receiving the Court's thoughts.

11 The next status conference, Your Honor, would be the date
12 also that the order would apply from our friends from Sulzer
13 Carbomedics might be ordered to produce the documents. And I
14 would suggest sometime perhaps in early May?

15 MR. ANGSTREICH: Your Honor, would it make sense to
16 do everything on the 15th? I mean if we start at 9:30, we
17 should be able to finish the preemption argument as well as
18 take care of any other open matters.

19 I will be advising Mr. Stanley that there's going to be
20 an issue with respect to some personnel files that were
21 produced. There was some redaction that happened. So we're
22 going to try and meet and confer about that. But that would
23 be the topic.

24 I don't know there's a whole host of topics for the same
25 day as the preemption. But I, for one, would ask if we could

1 avoid -- I mean I love it here, Your Honor -- if we could
2 avoid multiple trips would be just as well.

3 MR. ZIMMERMAN: It's beautiful in May here.

4 MR. CAPRETZ: That was a tentative date. We could
5 shoot for that.

6 THE COURT: What are your thoughts?

7 MR. KOHN: That day is agreeable subject to our
8 getting the preemption date clear.

9 THE COURT: If for some reason that gets put off
10 until a later date, then we will probably try to set a status
11 conference in the interim. So we're not tied to the
12 preemption motion specifically for the next status conference
13 unless it does proceed on the 15th of May.

14 If the Court is advised that we aren't proceeding until a
15 little bit later on that, then we'll set up a time probably
16 toward the end of April, first part of May, before your trial,
17 Mr. Angstreich.

18 MR. ANGSTREICH: Thank you, Your Honor.

19 MR. CAPRETZ: Thank you.

20 A couple housekeeping matters, Your Honor. The Court, in
21 deference to the schedules of certain attorneys to allow to
22 make this a one-day excursion, has been accommodating us
23 having 12:30 in the afternoon sessions, and we appreciate
24 that. I have since learned as well that even though this is a
25 pretty much of a long haul, three plus hours from California,

1 it may be rough to do in one day.

2 There is an early flight I could catch that I would land
3 at the airport at 12:30. So future sessions, if we could make
4 it perhaps 1:00 or 1:30, that would be more realistic for me
5 trying to make a one-day turn around.

6 THE COURT: Any problem with 1:30?

7 MR. ANGSTREICH: Your Honor, generally, no, if it's
8 a status conference and that's what we're going to do. We
9 have a 5:13 return flight to Philadelphia. The next flight
10 would be 7:45. So obviously, our druthers would be to try and
11 finish by 3:00, 3:30, so we could get to the airport. As
12 things ease going through security over time, it's not quite
13 as long. But 3:30 is the latest we can leave here and catch
14 the flight.

15 MR. CAPRETZ: My flight would --

16 MR. JACOBSON: St. Louis has a quarter after five or
17 5:30 flight. Sometimes they have a 7:45, sometimes a 9:00
18 p.m.

19 MR. MURPHY: Your Honor, there are flights every
20 hour to Las Vegas. We would love everybody to come and visit
21 the city as often as possible.

22 (Laughter).

23 MR. CAPRETZ: On the same subject, what we have done
24 in certain courts, and the last time was in Pittsburgh,
25 Pennsylvania, was like this one equipped for the high-tech

1 era, is appeared in certain circumstances through video
2 conferencing.

3 On a Daubert hearing, I was a witness in Newport Beach,
4 and the court was in session, the other attorneys in the
5 courtroom. It worked out quite well.

6 I think you probably have the mechanics. I don't know of
7 a particular situation where you might want to use that. But
8 it may be in the sense of cost efficiency and time efficiency
9 a way if this Court is open to the concept of appearances that
10 way.

11 THE COURT: Certainly. I think, correct me if I'm
12 wrong, but we have the wires in here for it.

13 Do we have the mobile equipment yet?

14 THE CLERK: I think so.

15 MR. JACOBSON: Judge, I believe I have the
16 wherewithal, I believe the Eighth Circuit heard oral argument
17 and one judge was in this building, one was in Kansas City,
18 and one was in St. Louis.

19 THE COURT: We did install the technical wiring for
20 it in all of our courtrooms. Unfortunately, we ran out of
21 money for buying the rest of the equipment to make it happen.

22 I think we now have the mobile equipment to move around
23 from courtroom to courtroom. I think it's possible. We
24 haven't tried it in here yet. And perhaps we should do a
25 trial run or something like that to make sure it works. But

1 I'm certainly open to doing anything by video conferencing.

2 MR. ANGSTREICH: Your Honor, my office has that
3 capability. So if you do want to test it, Lou Jean could call
4 my office and we could set it up. That certainly would be a
5 wonderful thing. I could sit in my conference room. I
6 wouldn't have to worry about what time the flight is.

7 MR. CAPRETZ: Your Honor, I don't know if defendants
8 have anything further. This is the agenda for today. Thank
9 you for your time.

10 THE COURT: Anything else?

11 Okay, very well. I will take you up on that, Mr.
12 Angstreich. We'll try to get some testing going here.
13 Because I think that would be efficient, especially for the
14 hearings where we don't have a lot on the agenda to handle.

15 MR. ANGSTREICH: Thank you, Your Honor.

16 THE COURT: Thank you. We'll be in recess, and
17 we'll see everyone next month.

18 (Court recessed at 2:00.)

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22 CERTIFIED:

23 Karen J. Grufman
24 Official Court Reporter

24

25